90-1761

No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1990

JOHN MONROE, ET AL.,

Petitioners,

v.

CITY OF WOODVILLE MISSISSIPPI, ET AL.,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. When the United States Supreme Court enters an Order vacating the judgment of a three-judge district court concerning § 5 of the Voting Rights Act of 1965 and remands the case to the district court with instructions to dismiss the appeal as moot, does a single district judge thereafter have jurisdiction, on a motion for award of attorney fees, to decide whether or not a change in voting had occurred?

2. Are petitioners prevailing parties when they file an action asserting a claim under § 5 of the Voting Rights Act of 1965 to an unprecleared voting change that has been in effect for 12 years and the local jurisdiction seeks and obtains preclearance of the voting change only after a hearing is scheduled on the § 5 claim?

3. Is the central issue test the proper standard for determining whether a party has prevailed in an action brought under 42 U.S.C. § 1973c such that the party is eligible for an award of attorney fees under 42 U.S.C. § 1973*l*(e) in light of the United States Supreme Court's ruling in *Texas Teachers Association v. Garland Independent School District?*

LIST OF PARTIES

The parties to the proceeding below were the petitioners JOHN MONROE, JIMMY HARRIS, JOHN GREEN and all others similarly situated and the respondents CITY OF WOODVILLE, MISSISSIPPI, RON SENKO, IN HIS CAPACITY OF MAYOR, AND CHARLES JAMES, GARY D'QUILLA, TIM SESSIONS, AS MEMBERS OF WOODVILLE, MISSISSIPPI BOARD OF ALDERMAN, JOE TOWNSEND, MARY MAGEE, AND HERBERT CURRY, AS MEMBERS OF THE CITY ELECTION COMMISSION AND FRANCES TOWNSEND AS CITY CLERK.

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REFERENCE TO OFFICIAL OPINIONS BY LOWER COURTS

Petitioners seek review of an adverse decision rendered by the United States Court of Appeals for the Fifth Circuit on March 15, 1991. The decision is unreported, and a copy of the decision is set out in Appendix 1. The Fifth Circuit decision affirmed the decision of the United States District Court for the Southern District of Mississippi. The district court's decision is unreported and is set out in Appendix 2.

The district court's decision was predicated upon an earlier decision rendered by a three-judge district court. The three-judge court's decision is set out in Appendix 3. That decision was vacated by the United States Supreme Court. The Supreme Court's order vacating the three-judge court's decision is set out in Appendix 4.

STATEMENT OF THE GROUNDS FOR INVOKING JURISDICTION

Petitioners seek review on writ of certiorari to the United States Court of Appeals for the Fifth Circuit of an adverse decision on prevailing party status in determining an award of attorney fees under 42 U.S.C. § 1973*l*(e). The adverse decision was rendered on March 15, 1991.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §§ 1254 and 2101(c). The questions presented are of substantial importance and involve a lower court's decision which conflicts with clear precedent established by this Court.

STATUTES INVOLVED

This case involves 42 U.S.C. § 1973*l*(e). A copy of the text of this statute is attached as Appendix 5.

STATEMENT OF THE CASE

Woodville, Mississippi is a special charter town whose municipal powers are derived from a charter issued directly by the State Legislature. The original town charter, issued in the 1800's, vested the Mayor and Board of Aldermen, the town's governing body, with the discretion to appoint the town marshal, the chief law enforcement officer. The Legislature amended the charter on February 22, 1890 requiring the town marshal position to be an elected one. Regularly scheduled elections were held for town marshal from 1890 until 1973. In 1973, the last town marshal, Fred McCarstle, a white male, was elected and served until his death in 1977. No town marshal elections have been held since 1973. The Mayor and Board of Aldermen claim that no election for town marshal has been held since 1973 because there has not been any public interest in filling the position. The appointed position of chief of police was created in 1968 by the town's governing body. The powers of the chief of police were coexistent with those of the town marshal. The chief of police position has been continuously occupied since 1968.

In 1977 the Mayor and Board of Aldermen passed a self-enacting resolution requesting the Legislature to amend the charter again making the town marshal an appointive position rather than an elected one. On April

11, 1977, the Legislature, pursuant to Woodville's request, enacted Chapter 932, S. B. No. 3145 changing the town marshal position from an elected one to an appointed one. The statute stated that it became effective from and after passage. Neither the statute nor the resolution of the Mayor and Board of Aldermen was precleared[1] prior to petitioners filing the instant § 5 action.

On March 2, 1988, petitioners, black voters in Woodville, instituted the instant action claiming the town had violated § 5 of the Voting Rights Act of 1965 by effectively abolishing the elected town marshal position by not holding elections without first obtaining preclearance.[2]

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[1] The district court stated that "the Board of Aldermen never adopted an appropriate resolution to effect that change." (App. 2). The district court overlooked the fact that the Board did not have to adopt any formal resolutions effecting the change. The ordinance adopted on February 7, 1977 whereby the Mayor and Board of Aldermen requested a legislative act to effect the change from an elected to an appointed town marshal was self-enacting. The February, 1977 resolution stated that it was effective after passage. The 1977 statute passed pursuant to the town's request was self-enacting. After the statute was passed, Woodville did not have another election for town marshal. Under state law no elected position could remain vacant. *State ex rel Doolittle v. Hays*, 91 Miss. 755, 45 So. 728 (1908); § 21-15-5, Miss. Code Ann. (1972) supplanted by § 23-15-857 (Miss. Code Supp. 1990); and § 21-11-9, Miss. Code Ann. (1972), supplanted by § 23-15-857, Miss. Code Ann. (Supp. 1990). The failure to hold elections for town marshal when required by state law to do so and when elections have been held in the past was a *de facto* change in voting. *County Council of Sumter County v. United States*, 555 F. Supp. 694 (D.D.C. 1983) (three-judge court).

[2] Petitioners' cause of action paragraph stated they raised a § 5 challenge concerning the failure to hold elections for marshal.

Jurisdiction was based on 42 U.S.C. §§ 1973(j)(f) and 1973c. On January 12, 1989, petitioners filed a motion to convene a three-judge district court and for summary judgment. A three-judge court was constituted on January 17, 1989. The respondents filed a motion for partial stay of proceedings on February 6, 1989 to seek preclearance of the abolition of the town marshal position.[3]

Then on February 7, 1989, the Mayor and Board of Aldermen adopted a resolution abolishing the town marshal position. The respondents submitted the February 7, 1977 and February 7, 1989 resolutions to the United States Attorney General for preclearance. (Appendix 7). The submission stated that the instant litigation pertaining to the voting change was pending in district court.

A hearing on petitioners' motion for summary judgment was held before the three-judge district court on March 24, 1989. On April 25, 1989, the district court formally entered a judgment stating that no voting change had been adopted or implemented by the respondents. Petitioners appealed the decision of the three-judge district court to the United States Supreme Court. While the appeal was pending, the United States Attorney General precleared the challenged voting change on May 2, 1989. The United States Supreme Court then, on October 16, 1989, entered an Order vacating the three-

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[3] The respondents acknowledged in their motion for partial stay of proceedings that "preclearance was the proper remedy for a Section 5 violation." (Appendix 6). Respondents also acknowledged petitioners lawsuit was a catalyst for their seeking preclearance of the challenged voting change. (Appendix 8).

judge district court's judgment and remanded the case to the district court with instructions to dismiss the case as moot and assessed costs against respondents. The three-judge district court, pursuant to the Supreme Court's order, entered an order dismissing the case as moot and remanded the question of whether or not petitioners were entitled to an award of attorneys' fees to the chief district judge. Petitioners timely moved for an award of attorney fees and litigation expenses.

On September 27, 1990, the single district judge denied petitioners' attorneys' fees motion holding that no voting change had occurred with respect to the town marshal position prior to petitioners' lawsuit being filed. The district judge also held that the "central issue" test was the proper standard for determining whether or not petitioners were prevailing parties. And, under that test, the district judge ruled that petitioners did not obtain the primary relief they sought. Therefore, the district court ruled that petitioners did not prevail on the central issue in litigation and were not prevailing parties entitled to an award of attorney fees. The Fifth Circuit affirmed the decision without a written opinion on March 15, 1991.

ARGUMENT I

When the United States Supreme Court enters an Order vacating the judgment of a three-judge district court concerning § 5 of the Voting Rights Act of 1965 and remands the case to the district court with instructions to dismiss the appeal as moot, a single district judge thereafter does not have jurisdiction, on a motion for award of attorney fees, to decide whether or not a change in voting had occurred.

This Court has held that Section 5 of the Voting Rights Act of 1965 requires a three-judge district court to decide whether or not a change in voting has occurred.[4] *Allen v. Board of Elections*, 393 U.S. 544, 561-63 (1969). Once a three-judge court has been properly convened, a single district judge is without jurisdiction to decide that question.[5] *Allen v. Board of Elections*, supra at 561-63. That

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[4] A single judge may issue a temporary restraining order enjoining the implementation of a covered voting change until a three-judge district court can be convened. *Perkins v. Matthews*, 400 U.S. 379, 383-86 (1971). However, the ultimate decision as to whether or not a voting change had occurred rests with a three-judge district court. *Allen v. Board of Elections*, supra at 561-63. As this Court stated in *Allen*, "congress intended that disputes involving the coverage of § 5 be determined by a district court of three judges." *Allen v. Board of Elections*, supra at 563.

[5] The district judge construed the Supreme Court's Order vacating the judgment of the three-judge district court in reliance on *United States v. Munsingwear*, 340 U.S. 36 (1950) as authority for the single district judge to decide anew whether a voting change had occurred. The district court's reliance on *Munsingwear* is misplaced. *Munsingwear* does not remove mootness from a case. *United States v. Munsingwear*, supra.

question is reserved exclusively for the three-judge district court. *Allen v. Board of Elections*, supra.

If the Supreme Court vacates a lower court judgment as moot and remands the case to the lower court, the parties can relitigate only the issues that are not moot. *United States v. Munsingwear*, supra.

If the § 5 judgment of a lower court is vacated and the case is remanded to the district court with instruction to dismiss the appeal as moot, a single district judge thereafter is without jurisdiction to decide whether or not a change in voting has occurred. *Allen v. Board of Elections, supra at 561-63; United States v. Munsingwear*, supra. On remand, the only issue that must be decided is whether or not a plaintiff was the prevailing party in bringing the action. *Hewitt v. Helms*, 482 U.S. 755 (1987). The relevant inquiry, then, is whether or not there was a change in defendant's conduct after the lawsuit was filed that redressed plaintiff's grievances. *Hewitt v. Helms*, supra. When a § 5 case is resolved without a judgment, the inquiry no longer focuses on whether or not a voting change has occurred. The inquiry, in that case, shifts to whether or not there was a change in the defendant's conduct that redressed plaintiff's grievances. *Hewitt v. Helms*, supra.

The decision of the district court and court of appeals that a single judge has jurisdiction, after a three-judge district court has been properly convened, to decide whether a voting change, within the meaning of § 5, has occurred contravenes clear precedent established by this Court. See *Allen v. Board of Elections*, supra at 561-63;

Perkins v. Matthews, supra at 383-86. As such, the question presented herein is substantial.

ARGUMENT II

Petitioners are prevailing parties when they file an action asserting a claim under § 5 of the Voting Rights Act of 1965 to an unprecleared voting change that has been in effect for 12 years and the local jurisdiction seeks and obtains preclearance of the voting change only after a hearing is scheduled on the § 5 claim.

Woodville's failure to hold elections for town marshal as required by state law[6] and consistent with the town's practice since 1890 constituted a change in voting. *Hathorn v. Lovorn*, 457 U.S. 255, 265 n. 16 (1982) ("Section 5 applies to any change reflecting the policy choices of the elected representatives of the people"). A change in voting occurs "whenever a covered jurisdiction departs from an election procedure that was 'in fact in force or effect' on November 1, 1964." *Hathorn v. Lovorn*, supra at 265 n. 16.

Here, the Mayor and Board of Aldermen evidenced their policy choices by passing a self-enacting resolution in February, 1977 changing the town marshal from an elected to an appointed position and not holding elections thereafter. This change was a departure from the town's practice of electing the town marshal since 1890.

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[6] State law required all elected positions to be filled by election, or by appointment for a short time and then a special election. Sections 21-11-9 and 21-15-5, Miss. Code Ann. (1972), repealed by Laws, 1986, Ch. 495, Section 329; *State ex rel Doolittle v. Hays*, 91 Miss. 755, 45 So. 728 (1908).

These facts establish a § 5 violation. See *Hathorn v. Lovorn*, supra at 265, n. 16; *McDaniel v. Sanchez*, 452 U.S. 130, 153 (1981); *County Council of Sumter County v. United States*, supra. Petitioners filed their § 5 declaratory judgment action in March, 1988. Respondents did not seek preclearance until February 7, 1989, approximately one month after petitioners had moved for summary judgment on their § 5 claim and a three-judge district court had been convened. Respondents noted in their submission that the instant litigation was pending in the district court which affected the voting change. And, the respondents filed a motion in the district court requesting that the three-judge district court stay the action until they could obtain preclearance of the challenged voting change. The respondents acknowledged that "preclearance was the proper remedy for a Section 5 violation." (Appendix 6). The respondents' § 5 submission and ultimate preclearance of the voting change constituted a change in their conduct that redressed petitioners' grievances. Therefore, petitioners established that they were prevailing parties. See *Hewitt v. Helms*, supra. The decision of the United States Court of Appeals for the Fifth Circuit that petitioners were not prevailing parties conflict with applicable decisions of this court. See *Allen v. Board of Elections*, supra; *Perkins v. Matthews*, supra; *McDaniel v. Sanchez*, supra; *Hathorn v. Lovorn*, supra; and *Hewitt v. Helms*, supra.

ARGUMENT III

The central issue test is not the proper standard for determining whether a party has prevailed in an action brought under 42 U.S.C. § 1973c such that the party is eligible for an award of attorney fees under 42 U.S.C. § 1973(*l*)(e) in light of the United States Supreme Court's ruling in *Texas Teachers Association v. Garland Independent School District?*

This court in *Texas State Teachers' Association v. Garland Independent School District*, 489 U.S. ___, 103 L.Ed.2d 866 (1989), rejected the "central issue" test applied by some courts of appeal in determining whether a party has prevailed in an action brought under 42 U.S.C. § 1983 such that the party is eligible for an award of attorney's fees under 42 U.S.C. § 1988. The court held:

> If the plaintiff has succeeded on 'any significant issue in litigation which achieve[d] some of the benefit the parties sought in bringing suit' the plaintiff has crossed the threshold to a fee award of some kind.

Texas State Teachers' Association v. Garland Independent School District, supra, 103 L.Ed.2d at 877. In the instant case, the Fifth Circuit upheld the district court's ruling that the "central issue" test was the proper test for determining whether or not petitioners were prevailing parties under 42 U.S.C. § 1973c such that they were eligible for an award of attorney fees under 42 U.S.C. § 1973*l*(e). This holding conflicts with the holding of this court in *Texas State Teachers' Association v. Garland Independent School District*, supra. Although *Texas State Teachers' Association* involved issues raised under 42 U.S.C. § 1988, the reasoning applicable to cases determining "prevailing party status" in § 1988 cases is the same as the reasoning

applicable in cases determining "prevailing party status" under 42 U.S.C. § 1973 (*l*)(e). The Fifth Circuit's holding otherwise conflicts with clear precedents established by this court. See *Texas State Teachers' Association v. Garland Independent School District*, supra; *Blanchard v. Bergeron*, 489 U.S. ___, 109 S. Ct. 939, 103 L.Ed.2d 67 (1989); *Hewitt v. Helms*, supra; *Rhodes v. Steward*, 488 U.S. 202 (1988); and *Hensley v. Eckerhart*, 461 U.S. 424 (1983).

CONCLUSION

Because the Court of Appeals for the Fifth Circuit rendered a decision which conflicts with many clear precedents of this court, and on the basis of the facts recited and authorities cited in this petition, petitioners respectfully submit that their petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit should be granted.

Respectfully submitted,

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APPENDIX 1

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 90-1841
Summary Calendar

JOHN MONROE, ET AL.,

Plaintiffs-Appellants,

versus

CITY OF WOODVILLE, MISSISSIPPI, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Mississippi
(W88 29(B))

(March 15, 1991)

Before GOLDBERG, GARWOOD, and JONES, Circuit Judges.

PER CURIAM:[1]

AFFIRMED on the basis of the district court's opinion.

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[1] Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that rule, the Court has determined that this opinion should not be published.

APPENDIX 2

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
WESTERN DIVISION

JOHN MONROE, JIMMY HARRIS AND JOHN GREEN AND OTHERS SIMILARLY SITUATED — PLAINTIFFS

VS. — CIVIL ACTION NO. W88-0029(B)

CITY OF WOODVILLE, MISSISSIPPI; RON SENKO, IN HIS CAPACITY AS MAYOR; CHARLES JAMES, GARY D'AQUILLA, AND TIM SESSIONS, AS MEMBERS OF WOODVILLE BOARD OF ALDERMEN; JOE TOWNSEND, MARY MAGEE, AND HERBERT CURRY, AS MEMBERS OF THE CITY ELECTION COMMISSION; AND FRANCES TOWNSEND AS CITY CLERK — DEFENDANTS

MEMORANDUM OPINION AND ORDER

(Filed Sep. 27, 1990)

This cause is before the Court on the Motion of Plaintiffs for an Award of Attorney's Fees and Litigation Expenses pursuant to 42 U.S.C. §§ 1973*l*(e) and 1988. By this Motion Plaintiffs seek $132,435.20 in attorney's fees and expenses, plus fees and expenses incurred in litigating the instant Motion, from the Town of Woodville, a municipality with a population of 1,512 persons. Having considered this Motion together with supporting and opposing documentation and memoranda, the Court finds that it is not well taken and should be denied.

Factual and Procedural Background

Woodville, Mississippi, is a special charter town whose municipal powers are derived from its own

charter issued directly by the Mississippi legislature rather than from the general laws governing non-special charter towns of the state. The original town charter of Woodville vested the Mayor and Board of Aldermen with the discretion to appoint the town marshal. On February 22, 1890, the Mississippi Legislature amended the charter of the town to require that the town marshal position be an elected one. Regularly scheduled elections were held for town marshal every four years from 1890 until 1973. In 1973 the last town marshal was elected and served until his death in 1977. Since that time, no candidate has qualified to run for the position of town marshal. The salary for the town marshal position was only $50.00 per month, and the powers of the town marshal were virtually coextensive with those of the chief of police, an appointed position which has been continuously occupied since 1968.

In 1977 the Woodville Board of Alderman passed a resolution requesting the Mississippi Legislature to amend its charter again so as to reverse the 1890 amendment requiring election of town marshals and allow that position to be made appointive once again. Subsequently the Mississippi legislature passed a special act allowing appointment of the town marshal, but the Board of Aldermen never adopted an appropriate resolution to effect that change. Accordingly, at the time this suit was filed by Plaintiffs, no change in the election procedures for the position of town marshal had been made and the position remained an elective one for which any eligible Woodville citizen who so desired could have run.

Because election commissioners were necessary for the holding of municipal elections and because no

candidates had been qualifying to run for those positions, the Woodville Board of Aldermen began to appoint election commissioners for the municipality at some point before 1987. Effective January 1, 1987, a statute passed by the Mississippi legislature mandated that governing authorities of towns with populations of fewer than 20,000 appoint rather than elect election commissioners. Miss. Code Ann. § 23-15-221 (Supp. 1989). That statute was precleared by the United States Justice Department prior to its effective date pursuant to requirements of the Voting Rights Act.

On March 2, 1988, Plaintiffs, who represented that they were black qualified electors of Woodville, filed suit against Woodville, its Mayor, its Board of Aldermen, its Election Commissioners, and its City Clerk pursuant to Section 5 of the Voting Rights Act claiming that Woodville had made changes in its voting practices and procedures without first submitting the changes to the Department of Justice for proper scrutiny. Plaintiffs alleged that Woodville had changed the method of selecting its town marshal and election commission members from elected to appointive selection without obtaining the required preclearance. Plaintiffs requested that the Court:

> (1) declare that the change in the town marshal position from an elected to an appointed office violated section 5 of the Voting Rights Act;
>
> (2) preliminary and permanently enjoin Defendants from appointing rather than electing the town marshal and order Defendants to conduct an immediate election for chief of police;
>
> (3) preliminarily and permanently enjoin the current chief of police from holding office;

(4) preliminarily and permanently enjoin defendants from appointing rather than electing election commissioners, and order those members appointed removed from office, and order Defendants to hold elections for election commissioner;

(5) grant Plaintiffs attorney's fees and court costs; and

(6) grant Plaintiffs equitable and general relief.

An Order of this Court dated December 1, 1988, certified the action as a class action maintainable under Rule 23(b)(2) of the Federal Rules of Civil Procedure and defined the class as all black registered voters of Woodville. An Order dated January 17, 1989, constituted a three-judge court composed of Judge E. Grady Jolly, Judge William H. Barbour, Jr., and Judge Tom S. Lee, to hear the action. After a hearing on March 24, 1989, the three-judge panel denied Plaintiffs Motion for Summary Judgment and specifically denied their request for injunctive relief regarding the positions of town marshal and election commissioners.

Plaintiffs appealed from the denial of summary judgment to the United States Supreme Court. Before the Supreme Court could render a decision, the Woodville Board of Aldermen passed a resolution seeking to formally abolish the position of town marshal. By letter dated May 2, 1989, the United States Justice Department precleared that change pursuant to the requirements of the Voting Rights Act. On October 16, 1989, the Supreme Court vacated the judgment of the three-judge court with costs and remanded the case to this Court with instructions to dismiss the appeal as moot.

By Order dated November 15, 1989, this Court dismissed the action as moot and granted Plaintiffs leave to move the Court for an award of attorney's fees. Plaintiffs filed their Motion for Attorney's Fees on December 12, 1989.

Analysis

1. The Standard for Determining "Prevailing Parties." Section 5 of the Voting Rights Act, codified as 42 U.S.C. § 1973c, requires a state or political subdivision to institute a declaratory judgment action whenever it "enact[s] or seek[s] to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting" which differs from that in effect prior to a certain relevant date and which has the potential to deny or abridge the right to vote on the basis of color, unless that change in voting practice or procedure has been precleared by the Justice Department.

As noted *supra*, Plaintiffs seek attorney's fees pursuant to both 42 U.S.C. § 1973*l*(e) and 42 U.S.C. § 1988. Section 1973*l*(e) provides that "[i]n any action or proceeding to enforce the voting guarantees of the fourteenth or fifteenth amendment, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." Section 1988 provides in relevant part as follows:

> In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party,

other than the United States, a reasonable attorney's fee as part of the costs.

The Court questions the applicability of section 1988 to this case since Plaintiffs have not sought by this action to enforce a provision of any of the statutes listed therein. However, since section 1988 and section 1973*l*(e) employ almost identical language and are construed in similar fashion, *Riddell v. National Democratic Party*, 624 F.2d 539, 543 (5th Cir. 1980); *Kirksey v. Danks*, 608 F. Supp. 1448, 1452 n.1 (S.D. Miss. 1985), the issue of Plaintiffs' entitlement to attorney's fees is not affected by whether one or both statutes apply.

In determining whether Plaintiffs are entitled to attorney's fees, the Court must resolve whether Plaintiffs are the "prevailing parties" in the instant action. It is firmly established that a plaintiff may be a "prevailing party" for purposes of an award of attorney's fees even where there has not been a final adjudication on the merits of plaintiff's claim and the case has terminated by virtue of a settlement or voluntary conduct by the defendant that moots the case. *Smith v. Robinson*, 468 U.S. 992, 1006 (1984); *Maher v. Gagne*, 448 U.S. 122, 129 (1980); *Wooten v. Housing Authority of City of Dallas*, 723 F.2d 390, 392 (5th Cir. 1984). In the absence of a judgment on the merits of the suit, however, the United States Court of Appeals for the Fifth Circuit has adopted a two tier standard for determining "prevailing party" status. That standard requires plaintiffs to show: 1) that they have succeeded on the central issues presented by the litigation so that they have substantially received the benefits sought in the lawsuit; and 2) that the existence of the lawsuit itself caused the unilateral capitulatory action by

the defendant through which those benefits were received. *Hennigan v. Ouachita Parish School Board*, 749 F.2d 1148, 1152 (5th Cir. 1985).

In determining whether this "prevailing party" standard has been met, the Court must initially identify the plaintiff's goal in bringing the action. *Hennigan*, 749 F.2d at 1152. Using this as the standard, the court must then determine whether, as a practical matter, that goal was achieved. If the plaintiff's goal has been achieved through unilateral acts of the Defendant, the plaintiff must then show that it was the lawsuit itself that caused the Defendant to undertake those actions. *Id.* To demonstrate this causal connection, the Plaintiff must establish that this suit was a "substantial factor or a significant catalyst" in motivating the Defendants to alter the course of their conduct. *Garcia v. Guerra*, 744 F.2d 1159, 1162 (5th Cir. 1984); *Posada v. Lamb County, Texas*, 716 F.2d 1066, 1072 (5th Cir. 1983). This means more, however, than merely showing that the Defendant's conduct occurred after the suit was filed. While the chronology of events should be considered in assessing the provocative effect of the Plaintiff's lawsuit, *see Wooten*, 723 F.2d at 392; *Posada*, 716 F.2d at 1072, "[h]ere, as elsewhere in the law, propter hoc must be distinguished from post hoc." *Hennigan*, 749 F.2d at 1152.

Where the plaintiff has shown that he has succeeded on the central issues in litigation and that his lawsuit caused the defendant to act, he has made out a prima facie case that he is a "prevailing party." The defendant may rebut this by establishing that his actions were merely a "gratuitous response" to plaintiff's contentions.

Id. at 1153. Where the plaintiff had no colorable or reasonable likelihood of success on the merits and the defendant's actions were not motivated by concerns that had to do with the potential merit of the suit, but rather by economic, political, or purely personal factors such as the desire to avoid protracted and expensive litigation, the "gratuitous response" defense bars recovery of attorney's fees. *Savidge v. Fincannon*, 836 F.2d 898, 904 (5th Cir. 1988); *Hennigan*, 749 F.2d at 1153.

2. *"Prevailing Parties" Under the Facts of the Instant Case.* In the instant action, Plaintiffs claim they are prevailing parties because Defendants sought preclearance of the abolition of the town marshal position as a result of and in response to Plaintiffs' suit.[1] Applying the standard set out above to the facts of this case, the Court reaches the obvious conclusion that Plaintiffs are not prevailing parties in the instant litigation.

In concluding that Plaintiffs are not prevailing parties in this suit, the Court notes that Plaintiffs' goal in bringing this suit was to secure public elections for the town marshal and election commissioner positions that they alleged had been impermissibly changed to appointive positions. As reflected by the prayer for relief contained in Plaintiffs' complaint, Plaintiffs requested a declaratory

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[1] Plaintiffs have apparently conceded the point that they did not prevail on their claim regarding the election commissioner positions. As noted *supra*, that claim was not mooted because of any actions by the Defendants in response to Plaintiffs' suit, but rather by an act of the Mississippi legislature that occurred before the instant suit was filed.

judgment that Defendants had violated the Voting Rights Act by changing the town marshal and the election commissioner positions from elective to appointive offices, injunctive relief to enjoin Defendants from further appointing individuals to those positions, and court-mandated public elections for the positions.

However, Plaintiffs did not obtain any of the relief that they requested in their complaint. The town marshal position for which Plaintiffs sought court-mandated elections has now been abolished. The election commissioners, which Plaintiffs sought to have elected, are still appointed. Furthermore, Plaintiffs have failed to secure a declaratory judgment that Defendants have in any way violated section 5 of the Voting Rights Act[2], and no injunctive relief has been afforded in this case. Since Plaintiffs have not achieved any of the goals that prompted the filing of this lawsuit, this Court concludes that Plaintiffs have failed to establish the first requirement for the finding of "prevailing party" status.

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[2] The Court here responds to Plaintiffs' assertion that the vacation by the United States Supreme Court of the denial of summary judgment by the three-judge panel constituted a reversal of the decision of the panel. Plaintiffs' implicit assertion is that the Supreme Court somehow indicated its disagreement with the decision of the three-judge panel on the merits. This is not the case. Instead, the vacation represented the standard response of the Supreme Court when a case becomes moot during the pendency of an appeal. *United States v. Munsingwear*, 340 U.S. 36, 39 (1950). It allows future relitigation of the issues between the parties and preserves the rights of *all* parties. *Id.* at 40.

In attempting to put the best face possible on the abolition of the town marshal position that brought an end to this suit, Plaintiffs have now asserted that the purpose of this lawsuit was not to force elections for the town marshal and election commissioner positions, but rather to prevent the Defendants from implementing voting changes without obtaining preclearance pursuant to section 5. Plaintiffs' Supplemental Brief on Prevailing Parties at 2. In effect, the Plaintiffs are attempting to switch horses in mid-stream in order to recover their attorney's fees and expenses. They brought suit under the theory that Woodville had changed from an elected town marshal to an appointed town marshal without obtaining section 5 preclearance. When they failed to prove their case the Woodville undertook the housekeeping procedure of abolishing the town marshal position in which there had been no interest by a single candidate in several years, Plaintiffs decided to claim that the suit had been instituted to force the city to comply with section 5.

While the Court does recognize that seeking "compliance with the law" is always a goal of litigation in the broadest sense possible, the Court is not persuaded that this rationale alone is sufficient to support a finding that Plaintiffs in this case are prevailing parties where the legally required acts undertaken by the Defendant were not those specifically requested by Plaintiffs and where those acts had no connection to the case other than the fact that they involved a public office over which separate litigation was pending. This Court has determined that no changes in voting practice or procedure as relates to the town marshal position had taken place prior to the institution of this suit. The actions taken by Woodville to

abolish the town marshal position took place after the suit had been filed and were not part of the occurrences complained of by the Plaintiffs. Nor were the acts to abolish the office part of the specific relief requested by Plaintiffs. If this Court were to accept Plaintiffs' position that a Defendant's mere compliance with the requirements of the law subsequent to the filing of a suit is enough to cast Plaintiffs in the role of prevailing parties, it would be sanctioning a rule of law that would allow Plaintiffs to file suits concerning particular public offices and then declare themselves prevailing parties under this general "compliance with the law" standard whenever voting changes pertaining to those offices were subsequently undertaken and approved, regardless of the fact that such changes were not part of the specific relief requested in the case and had no true connection to the dispute presented by the suit.

IT IS THEREFORE ORDERED that Plaintiffs' Motion for an Award of Attorney's Fees and Litigation Expenses be denied.

SO ORDERED this the 26th day of September, 1990.

/s/ William H. Barbour, Jr.
CHIEF JUDGE

APPENDIX 3

[p. 1] UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

JOHN MONROE, JIMMY HARRIS,
JOHN GREEN, AND OTHERS
SIMILARLY SITUATED

PLAINTIFFS,

V. CIVIL ACTION NO. W88-0029(B)

CITY OF WOODVILLE,
MISSISSIPPI, ET AL

DEFENDANTS.

BENCH OPINION

BEFORE: THE HONORABLE E. GRADY JOLLY, JR.
THE HONORABLE WILLIAM H. BARBOUR, JR.
THE HONORABLE TOM S. LEE
UNITED STATES DISTRICT JUDGES

DATE: MARCH 24, 1989

PLACE: JACKSON, MISSISSIPPI

APPEARANCES:

COUNSEL FOR PLAINTIFF:

MR. WILLIE L. ROSE
MS. DEBORAH McDONALD
MR. CARROLL RHODES

COUNSEL FOR DEFENDANT:

MR. DENNIS L. HORN

COURT REPORTER:

MS. CELESTE O. McCLELLAND, RPR
245 E. CAPITOL, ROOM 534
JACKSON, MISSISSIPPI 39201
(601) 965-5135

[p. 2] JUDGE JOLLY: We are going to do the best we can here about ruling on this case without the benefit of any law clerk advice. The judges cannot move very effectively if we don't have law clerks and we didn't have their advice on this so we may not be as smooth as we usually are.

With respect to Woodville and the Town Marshal, our basic finding is that the Plaintiffs in that case have not demonstrated that there was a change. The burden was on you to demonstrate that there was a change in the voting practice and procedure.

Now, there was the resolution before the enabling statute that indicated the intent of the City. But after the enabling statute was passed, there was no formal resolution or any other evidence that the City had actually abolished the office as an elective office.

That would not preclude you as Plaintiffs from showing that it has been abolished if you could come forward with the evidence that might demonstrate that. So we looked at the evidence that you came forward with and the evidence that generally existed.

Now, your basic argument and the evidence that you asserted most strongly was that no notice had ever been given that the office was open for elections. Now, with respect to that, we don't think that you carried your burden in that sense because although there may not have been any notice as [p. 3] such that there would be an election for a Marshal, we do not find that that had been a former practice based upon the oral testimony here and based upon any kind of evidence.

Now, as far as the oral testimony here is concerned, we weren't quite sure that we understood the full impact of it because as we understood it there was simply no evidence that was given on the witness stand that there was a practice of formal notice that each particular office would have an election and everybody invite people to come down and qualify, which was essentially your position.

In any event, we find that to the extent that we may have misunderstood the oral testimony, that the best evidence rule applies in that you had the burden of trying to sustain your motion for summary judgment. And you did not come forward in the documentary evidence that would show that they had previously published a notice inviting people to qualify for this office and that after 1977 they failed to publish such a notice to indicate their clear intention that they had abolished the office.

The further evidence that convinced us was that it had not been abolished, that you produced no evidence that anybody had ever been denied. Now, if you could have come forward with someone who went down and says, I want to run for Marshall; and the Town Father says, that job has been abolished so we're not going to let you. That would have [p. 4] been very strong evidence. But unfortunately there was no evidence that any person, black or white, had ever attempted to run for the job and had been denied the job.

All of that has to be considered against the City's contention that we view skeptically that the job had not been abolished because there was some evidence that

they had at least intended to abolish the office and perhaps had never gotten around to it.

The burden remained on the Plaintiffs to show that there had been a change. The evidence also, of course, that the Police Chief, and that was part of the evidence, I think, that perhaps the Plaintiffs were suggesting, that the Police Chief has assumed the role of the Marshal. Well, we looked at that and found that the Police Chief existed at the same time that the Marshal's office was and it was not an office that had been created as a subterfuge for the office of Town Marshal that they intended to abolish.

We, as I say, looked at the contention of the City that they had never abolished the office and that simply nobody had ever come forward to qualify for the office. And that was fairly demonstrated by the lack of evidence on the part of the Plaintiffs or any other evidence that came to our attention that indeed nobody had qualified for the office after 1977.

So I think our decision is also influenced by the fact [p. 5] that the City takes the position now that if you want to come down and attempt to qualify, pay your money and attempt to qualify for the position of the Marshal, you are free to do so now, thus indicating that as far as the City records are concerned and as far as the City action is concerned, no action is required on their part to reinstitute the Marshal's job in order to make it available the way the vote is now.

So certainly I would point out that the Plaintiffs in this case have not been harmed if today you can, as the

City has indicated, go down and qualify for that particular job.

As a finding of fact we find that the Plaintiffs have not met their burden of showing that there was a change in the sense that the job was abolished. There just is no convincing evidence that it was, in fact, abolished.

And hence we find as a fact that there was no change in a voting practice or procedure within the meaning of Section 5.

Now with respect to the Election Commissioners. As we understand that case, there is no genuine issue of fact, or no genuine issue of material fact with respect to the summary judgment that is pending before us.

As to the fact that the reason that the City began appointing Election Commissioners was because no one offered for the job. There was no evidence that that is not a fact.

There was no evidence adduced that there had ever been a [p. 6] change in the voting procedure. There was no evidence that was before us that the City had declared those to be appointed positions and that nobody could run for them. There had been no evidence suggested, as there had been in the case of the Marshal, the pre-enabling statute resolution was passed by the City. There was no such evidence that would even suggest here that the City had ever intentionally or deliberately or otherwise eliminated from the election procedures the Election Commissioners.

The testimony was that they had to have some Election Commissioners and that the only way that they

could get them was to appoint them. And, again, we didn't see that that was any evidence that would preclude summary judgment for our making the conclusion that that was a fact for purposes of summary judgment.

Now, of course, you can argue and point out, and there is some validity to it that even though there was no change in the election procedure, and even though no one would step forward to qualify for the Election Commissioner, that the mere fact that the City appointed these previously elected jobs was a change within the Voting Rights Act even though these people, apparently from the City's point of view, at least, and one that we accept from the record before us, that this was a stop-get measurement that was justified or required only because no one would offer for election. Even [p. 7] if there is a change in practice that would be subject to Section 7 of the Voting Rights Act, we found that the intervening statute, in effect, mooted any claim that that was a violation of Section 5 requiring a preclearance because in 1986, and the law was made effective, I believe, January 1 1987, the Justice Department had authorized and had cleared a statute that required the appointment and not the election of these Election Commissioners. And for that reason we find that Section 5 was mooted by the preclearance of the statute.

As far as the persons continuing to serve after January, 1987, it is our opinion that they were ratified by their continuing service at the pleasure of the City Council and the Board of Aldermen and the Mayor.

We would also note, though, that the Election Commissioners, especially as they exist in Woodville, Mississippi, has very insignificant function; that the primary function of conducting elections is done in terms of the Democratic party; the Election Commissioners that are appointed simply serve a perfunctory service in the general election that has been over the years and continues to be essentially meaningless.

We would also note in passing that any kind of relief with respect to the voting Commissioners in Woodville is almost meaningless. And that is because if we granted the [p. 8] relief that we understand is being asked for or that would be appropriate under these circumstances to correct or remedy any wrong as a result of violation of Section 5 of the Voting Rights Act, would be to remove these persons from office and to hold special election and let them serve between now and May 2, when after June, I guess it would be, after the new Mayor and Board of Aldermen take effect, they would simply appoint new Election Commissioners under the 1987 Act. And since there would be, I guess, maybe one general election that might occur while they would be in service, they would have no real function to perform and that the remedy that you seek is essentially meaningless.

So with respect to both the Town Marshal and the Election Commissioners, we find that the fact was that there was no change in any voting practice or procedure and deny the motions for summary judgment. And specifically deny the request for injunctive relief.

(Recess.)

APPENDIX 4

SUPREME COURT OF THE UNITED STATES

No.

89-301

John Monroe, et al.,

Appellants,

v.

City of Woodville, Mississippi, et al.

W88-0029(B)

FILED NOV 22 1989

APPEAL from the United States District Court for the Southern District of Mississippi.

THIS CAUSE having been submitted on the statement as to jurisdiction and motion to dismiss or affirm,

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this Court that the judgment of the above court, in this cause is vacated with costs, and that this cause is remanded to the United States District Court for the Southern District of Mississippi with instructions to dismiss the appeal as moot. *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950).

IT IS FURTHER ORDERED that the appellants, John Monroe, et al., recover from City of Woodville, Mississippi, et al., Two Hundred Dollars ($200.00) for their costs herein expended.

APPENDIX 5

§ 1973*l*. Enforcement proceedings

(a) Criminal contempt. All cases of criminal contempt arising under the provisions of this Act shall be governed by section 151 of the Civil Rights Act of 1957 (42 U.S.C. 1995) [42 USCS § 1995].

(b) Jurisdiction of courts for declaratory judgment, restraining orders, or temporary or permanent injunction. No court other than the District Court for the District of Columbia or a court of appeals in any proceeding under section 9 [42 USCS § 1973g] shall have jurisdiction to issue any declaratory judgment pursuant to section 4 or section 5 [42 USCS § 1973b or 1973c] or any restraining order or temporary or permanent injunction against the execution or enforcement of any provision of this Act or any action of any Federal officer or employee pursuant hereto.

(c) Definitions. (1) The terms "vote" or "voting" shall include all action necessary to make a vote effective in any primary, special, or general election, including, but not limited to, registration, listing pursuant to this Act, or other action required by law prerequisite to voting, casting a ballot, and having such ballot counted properly and included in the appropriate totals of votes cast with respect to candidates for public or party office and propositions for which votes are received in an election. (2) The term "political subdivision" shall mean any county or parish, except that where registration for voting is not conducted under the supervision of a county or parish, the term shall include any other subdivision of a State which conducts registration for voting.

(3) The term "language minorities" or "language minority group" means persons who are American Indian, Asian American, Alaskan Natives or of Spanish heritage.

(d) Subpenas [sic]. In any action for a declaratory judgment brought pursuant to section 4 or section 5 of this Act [42 USC § 1973b or 1973c], subpenas [sic] for witnesses who are required to attend the District Court for the District of Columbia may be served in any judicial district of the United States: Provided, That no writ of subpena [sic] shall issue for witnesses without the District of Columbia at a greater distance than one hundred miles from the place of holding court without the permission of the District Court for the District of Columbia being first had upon proper application and cause shown.

(e) Attorney's fees. In any action or proceeding to enforce the voting guarantees of the fourteenth or fifteenth amendment [USCS Constitution, Amendments 14, 15] the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

(Aug. 6, 1965, P. L. 89-110, Title I, § 14, 79 Stat. 445; June 22, 1970, P. L. 91-285, § 2, 84 Stat. 314; Aug. 6, 1975, P. L. 94-73, Title II, § 207, Title IV, § 402, 89 Stat. 402, 404.)

APPENDIX 6

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF
MISSISSIPPI WESTERN DIVISION

JOHN MONROE, ET AL. — PLAINTIFFS

VS. — NO. W88-0029(B)

CITY OF WOODVILLE, MISSISSIPPI, ET AL. — DEFENDANTS

MOTION FOR A PARTIAL STAY OF PROCEEDINGS

(Filed Feb. 06, 1989)

COME NOW the Defendants, Town of Woodville and public officials thereof, and move this Court to stay proceedings herein to allow the Town to seek preclearance pursuant to Section 5 of the Voting Rights Act of 1965 from the United States Justice Department of its resolution seeking to abolish its current position of elected town marshall, on the ground that Plaintiffs alleged that the Defendants actually have abolished the position of town marshall, which they have not but, in any event, the Town wishes to have precleared the abolition of town marshall position so that the chief of police, as appointed by the Town board, would be the chief law enforcement officer in the Town of Woodville. Allowing the opportunity to preclear is the appropriate remedy in Section 5 litigation, even if Plaintiffs do prevail.

Respectfully submitted,

/s/ Dennis L. Horn
DENNIS L. HORN

Dennis L. Horn
HORN & PAYNE
P. O. Box 1725
Jackson, MS 39215-1725
601/373-0170

ATTORNEY FOR DEFENDANTS

NOTICE OF MOTION

Please take notice that Defendants bring on for hearing their Motion For a Partial Stay of Proceedings before a three-judge Court, Honorable E. Grady Jolly, United States Circuit Judge, Honorable William H. Barbour, United States District Judge, and Honorable Tom S. Lee, United States District Judge, at the United States District Courthouse in Jackson, Mississippi, as soon as counsel can be heard.

Respectfully submitted,

/s/ Dennis L. Horn
DENNIS L. HORN

CERTIFICATE OF SERVICE

I, Dennis L. Horn, hereby certify that I have this date mailed, postage prepaid, a true and correct copy of the above and foregoing Motion For a Partial Stay of Proceedings to Willie L. Rose, Esquire, 6675 Old Canton Rd., Apt. 1144, Ridgeland, Mississippi 39157, and Deborah McDonald, Esquire, Southwest Mississippi Legal Services, P. O. Box 1242, McComb, Mississippi 39648, and

Carroll Rhodes, Esquire, P. O. Box 588, Hazlehurst, Mississippi 39083.

This the 6th day of February, 1989.

/s/ Dennis L. Horn
DENNIS L. HORN

APPENDIX 7

February 28, 1989

David Marblestone, Esquire
Assistant Attorney General
Civil Rights Division
Department of Justice
Washington, D.C. 20530

RE: Submission of Town of Woodville, Mississippi, under Section 5 of the Voting Rights Act for preclearance

Dear Mr. Marblestone:

As set forth in the heading, this document is a submission to you for expedited preclearance of a change in voting for the Town of Woodville, Mississippi. Specifically, the Town on February 7, 1989, entered a Resolution abolishing the position of elected Town Marshall and replacing that position with an appointed Chief of Police, said Resolution effective upon Justice Department preclearance.

FORMAL SUBMISSION

I. Required Contents:

(a) Exhibit "A" hereto is the Resolution abolishing pending preclearance by the United States Justice Department pursuant to Section 5 of the Voting Rights Act of 1965, the position of elected Town Marshall so that the appointed Chief of Police may be the formal chief law enforcement officer in the Town of Woodville, Mississippi.

(c) The name, title, address and telephone number of the person making the submission: Dennis L. Horn,

Esquire, Horn & Payne, P. O. Box 1725, Jackson, Mississippi 39215-1725, (601) 373-0170.

(d) The name of the submitting authority and the name of the jurisdiction responsible for the change: Town of Woodville, Wilkinson County, Mississippi.

(f) Identification of the person or body responsible for making the change and the mode of decision: The Board of Alderman, Town of Woodville, Mississippi.

(g) A statement identifying the statutory ordinance authority under which the jurisdiction undertakes to change, and a description of the procedure the jurisdiction was required to follow in deciding to undertake the change: The local and private Bill passed by the Legislature and signed by the Governor of Mississippi on April 11, 1977, granting the Town of Woodville, Mississippi, the authority, in its discretion, to appoint the "Marshall" of the Town of Woodville instead of electing the "Marshall", a copy of said local and private bill is annexed hereto and incorporated herein as Exhibit "B".

(h) The date of adoption of the change affecting voting: Upon preclearance.

(i) The date on which the change takes effect: The next scheduled primary election in the Town of Woodville is set for the first Tuesday in May, 1989. If precleared, there would be no election for Town Marshall.

(l) A statement of the reasons for change: The Town Marshall position has been vacant for over ten years due to lack of interest. No one has qualified and run for the position.

(m) A statement of the anticipated effect of the change on members of racial or language minority groups: None.

(n) A statement identifying any past or pending litigation concerning the change or related voting practices: Currently pending in the United States District Court for the Southern District of Mississippi is *Monroe v. City of Woodville,* W88-0029(B). This action attacks as violating Section 5 of the Voting Rights Act of 1965 Woodville's purported appointment of the Town Marshall and abolition of the elected position. True and correct copies of the Complaint in that action and Plaintiff's Motion for Summary Judgment (without exhibits), Defendants Response to Motion For Summary Judgment (without exhibits), Defendant's Motion for Partial Stay of Proceedings (so that the Town of Woodville can attempt to have the "formal" abolition "of the position of Town Marshall, as elected, abolished), and Plaintiff's Response in Opposition to Motion for Partial Stay of Proceedings are annexed hereto and incorporated herein as composite Exhibit "C". Please note that, in Defendant's Motion for Partial Stay of Proceedings, the Defendants seek thirty (30) days from the 3-judge court to seek to have precleared this change in voting that would allow for the formal abolition of the elected Town Marshall position and filing an appointed Chief of Police to be the chief law enforcement officer in the Town of Woodville, Mississippi.

In terms of minority group contacts, please contact Deborah McDonald, Esquire, attorney for the Plaintiffs in said litigation at (601) 684-0578.

We request that this request for preclearance be expedited so that the Town can determine whether it will hold elections for the position of Town Marshall in said May, 1989 primary elections.

Sincerely,

DENNIS L. HORN

DLH:em

RICHARD T. WATSON
WATSON, WILKERSON & WALSH
P. O. BOX 637
WOODVILLE, MS 39669

cc: Hon. Ron Senko, Mayor
P. O. Box 519
Woodville, MS 39669

Hon. Deborah McDonald
Southwest Miss. Legal Services
P. O. Box 1242
McComb, MS 39648

APPENDIX 8

IN THE UNITED STATES DISTRICT
COURT FOR THE SOUTHERN DISTRICT
OF MISSISSIPPI WESTERN DIVISION

JOHN MONROE, ET AL. — PLAINTIFFS

VS. — NO. W88-0029(B)

CITY OF WOODVILLE, MISSISSIPPI,
ET AL. — DEFENDANTS

RESOLUTION

WHEREAS, on 7th day of February, 1989, the Board of Alderman of the Town of Woodville, Mississippi passed a Resolution abolishing the position of Town Marshall, and directed the Town Attorney promptly to seek preclearance from the United States Justice Department, pursuant to Section 5 of the Voting Rights Act of 1965, of the abolition of the position of Town Marshall and the replacement therewith the position of Chief of Police as chief law enforcement officer in the town of Woodville.

WHEREAS, on May 2, 1989, the United States Attorney General by, and through, Barry H. Weinberg, Acting Cheif [sic], Voting Section, of the U. S. Justice Department, gave official, written notice that said change had been precleared by the U. S. Justice Department.

NOW, THEREFORE, BE IT ORDERED, the Town of Woodville, Mississippi, formally gave official, written notice that said change had been precleared by the U. S. Justice Department.

NOW, THEREFORE, BE IT ORDERED, the Town of Woodville, Mississippi, formally abolishes the position of Town Marshall, and vest in an appointed Chief of Police the authority of the Town Marshall in the Town.

BE IT FURTHERED ORDERED, that the May 2, 1989 letter from Barry H. Weinberg, Acting Chief, Voting Section, of the U. S. Justice Department, annexed hereto and incorporated herein, be made a formal part of the Minutes of the Town of Woodville, Mississippi, to reflect official preclearance of the abolition of the Town Marshall position.

BE IT RESOLVED this the 6 day of June, 1989, said Resolution having been unanimously passed by the Board of Aldermen of the Town of Woodville, Mississippi, those alderman being Charles James, Gary D'Aquilla, Elnora Veals and Timothy Sessions.

/s/ Ron Senko
RON SENKO,
MAYOR OF WOODVILLE

Supreme Court, U.S.
FILED
JUN 13 1991
OFFICE OF THE CLERK

(2)

No. 90-1761

In The

Supreme Court of the United States

October Term, 1990

JOHN MONROE, et al.,

Petitioners,

v.

CITY OF WOODVILLE, MISSISSIPPI, et al.,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION

DENNIS L. HORN*
SHIRLEY PAYNE
HORN & PAYNE
P.O. Box 1725
Jackson, MS 39215
(601) 373-0170
Counsel for Respondents

*Counsel of Record

June 13, 1991

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED FOR REVIEW

This case involves the denial of attorneys' fees on a Voting Rights case in which a Three-Judge Court denied all relief and the United States Supreme Court subsequently dismissed the Appeal as moot. In no manner were the positions of the parties changed as a result of the Petitioners' litigation.

The sole issue consists of the following:

> Whether the District Court's denial of attorneys' fees, upon its consideration of well-settled law and upon its finding that the Petitioners were not prevailing parties, was properly affirmed by the Fifth Circuit Court of Appeals since there was no abuse of discretion, no conflict with precedent from other circuits, and no departure from the accepted and usual course of judicial proceedings or conflict with applicable decisions of this Court.

PARTIES TO THE PROCEEDINGS BELOW

John Monroe, Jimmy Harris and John Green, individually and on behalf of a class certified under Rule 23(b)(2) of the Federal Rules of Civil Procedure, defined as "all black citizens and all black registered voters of the City of Woodville, Mississippi."

City of Woodville, Mississippi, Ron Senko, in his capacity as Mayor of Woodville, Mississippi, George J. Gonda, former Mayor of Woodville, Mississippi, Andy J. Lewis, former Alderman, Frances Townsend as City Clerk, Gary D'Quilla, Charles James, Tim Sessions, Elnora Veals, current Aldermen; and Joe Townsend, Mary Magee, and Herbert Curry as Election Commissioners.

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OPINIONS BELOW

The United States Court of Appeals for the Fifth Circuit disposed of the appeal herein on summary calendar by per curium affirmance, entered by Goldberg, Garwood and Jones, Circuit Judges, on March 15, 1991. The opinion is unpublished, pursuant to Fifth Circuit Local Rule 47.5 which provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession."

The decision of Judge William H. Barbour, Jr., of the United States District Court for the Southern District of Mississippi, Western Division, was entered by Memorandum Opinion and Order filed September 27, 1990. This decision is also unpublished.

The District Court's decision here sought to be reviewed was based upon an earlier decision on the merits rendered by a Three-Judge District Court, denying all relief to Petitioners. That decision was entered by Bench Opinion of March 24, 1989. It is unpublished.

The Supreme Court of the United States, on October 16, 1989, vacated the judgment of the Three-Judge District Court and remanded with instructions to dismiss the appeal as moot, in accordance with *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950). That decision, *Monroe v. City of Woodville, Miss.*, is reported at ___ U.S. ___, 110 S.Ct. 273, 107 L.Ed.2d 254 (1989).

JURISDICTION

Jurisdiction of this Court is sought to be invoked pursuant to 28 U.S.C. Sections 1254 and 2101(c). The Petition for Writ of Certiorari was timely filed within ninety (90) days after the entry of judgment by the Fifth Circuit Court of Appeals on May 15, 1991, pursuant to Rule 13 of the Supreme Court Rules. This Brief in Opposition is timely filed within thirty (30) days after receipt of the Petition for Writ of Certiorari, pursuant to Rule 15 of the Supreme Court Rules.

STATUTES INVOLVED

42 U.S.C. Section 1973*l*(e) provides that "[i]n any action or proceeding to enforce the voting guarantees of the fourteenth or fifteenth Amendment, [USCS Constitution, Amendments 14, 15] the Court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

STATEMENT OF THE CASE

The City of Woodville should not be held liable for attorneys' fees on a case that Petitioners lost. There are no issues presented on this Petition for Certiorari that warrant the review of this Court.

When this litigation began the Petitioners sought injunctive relief (1) to enjoin the appointment of election commissioners and (2) to enjoin the appointment of and obtain the election of a town marshal for the City of

Woodville, Mississippi. These claims were brought pursuant to Section 5 of the Voting Rights Act (R.Vol.1, p.4) against a town of 1,512 persons (R.Vol.1, p.179).[1] Petitioners prevailed on neither issue. Nevertheless, Petitioners now seek an award of $132,435.20 in attorneys' fees.

The Complaint was filed on March 2, 1988. More than a year prior to that date, the Mississippi Election Code had been amended to provide that towns of fewer than 20,000 people thereafter would appoint, rather than elect, the election commissioners. Section 23-15-221, Miss. Code Ann. 1972 (Supp. 1987). This change in State law was precleared by the United States Justice Department effective January 1, 1987. (See editor's note preceding Section 23-15-1 of the Mississippi Code, concerning the United States Attorney General's interposition of no objection to the amendment of former Section 23-11-13).

The Petitioners certainly did not prevail upon their frivolous claim that Woodville's Election Commissioners should continue to be elected after the precleared amendment to state law. At the Summary Judgment/Injunction hearing held on the merits, the Petitioners contested the preclearance of the Mississippi Election Code mandating the appointment of election commissioners, even in light of the Respondents' filing of record the letters of December 31, 1986, and January 2, 1987, from Gerald W. Jones,

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[1] The population of 1,512 is based on the 1980 census. the 1990 census is expected to show a decrease in that population.

Chief, Voting Section of the United States Justice Department reflecting that relevant changes in the Mississippi voting statutes indeed had been precleared. (R.Vol.4, pp.19-20).

The Petitioners had also sought relief from the Three-Judge Court to:

> (1) Declare that the change in the Town marshal position from an election to an appointed office violated Section 5 of the Voting Rights Act;

The Three-Judge District Court specifically held that the town had never changed the office of town marshal from elective to appointive. Rather, that office died due to lack of interest. The Petitioners obtained no relief with respect to this goal of their litigation. (R.Vol.3, p.727).

The town marshal's position paid only $50.00 per month and had powers virtually co-extensive with those of the chief of police, (R.Vol.1, p.210) whose position has been continually occupied since 1968. Since the last town marshal died in office in 1977, there had been no candidate who had attempted to qualify or run for town marshal. (R.Vol.1, p.7). After 1977, the position of town marshal simply remained unoccupied; no one wanted the job. The State Legislature did pass a self-enacting state statute which would have provided for appointment of Woodville's town marshal, but this enabling legislation was never adopted by an ordinance of the Town of Woodville to accomplish that act. (R.Vol.4, p.3). Neither did Woodville appoint a town marshal. The position simply remained vacant.

Next, Petitioners sought relief to:

> (2) Preliminarily and permanently enjoin defendants from appointing rather than electing the town marshal and order defendants to conduct an immediate election for chief of police;

The Three-Judge District Court held there to be no change in appointing rather than electing the town marshal. The Respondents were not ordered to conduct an immediate election for chief of police. The Petitioners at no point obtained either a preliminary or a permanent injunction in this action.

Third, Petitioners sought relief to:

> (3) Preliminarily and permanently enjoin the current chief of police from holding office.

Since 1968, a chief of police has held and continues to hold office in Woodville. Holding office since 1968 was one of the bases for the ruling of the Three-Judge Court: "The burden remained on the Plaintiffs to show that there had been a change. The evidence also, of course, that the Police Chief, and that was part of the evidence, I think, that perhaps the Plaintiffs were suggesting, that the Police Chief has assumed the role of the Marshal. Well, we looked at that and found that the Police Chief existed at the same time that the Marshal's office was and it was not an office that had been created as a subterfuge for the office of Town Marshall that they intended to abolish." (R.Vol.5, p.4).

No change was brought about as a result of this lawsuit which changed the position of the parties. Since there was no change in voting, the Petitioners did not prevail on the merits. On the subsequent attorneys' fees

issue, the Courts below have also concluded that there was no change achieved by the Petitioners which would justify fees. (District Court Memorandum Opinion and Order, R.Vol.3, pp.721-22).

Petitioners now attempt to characterize their claim as a challenge to the failure to call special elections when and after no one qualified to run for town marshal. This issue was never raised in the case presented on the merits and this issue cannot be properly before this Court. The District Court discussed and rejected the effort of the Petitioners to "to switch horses in midstream," (R.Vol.3, p. 728) and rejected the claim for fees based on Woodville's abolishing the town marshal position. The Petitioners never sought to abolish that office; nor could they validly seek to abolish an office under their claim for relief pursuant to the Voting Rights Act. The mere fact that Woodville did comply with preclearance procedures when it abolished the town marshal post does not render the Town liable for fees.

The Petitioners presented a meritless claim and lost before the Three-Judge Court. During the pendency of their appeal to the United States Supreme Court, the Town marshal position ceased to exist by way of an action unilaterally undertaken by Respondents to abolish the moribund office. There was, and is, no legal causation between the Petitioners' efforts and the abolition of the town marshal position. The Petitioners herein had never sought to abolish the town marshal position; they had sought to fill that position by election, pursuant to Section 5 of the Voting Rights Act. 42 U.S.C. Section 1973c. The Petitioners have not obtained, by catalyst or otherwise, any of the relief they sought in their complaint.

After the position of town marshal was abolished by preclearance of the United States Justice Department, the Three-Judge Court's Opinion was vacated as moot in light of *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950). The Petitioners herein neither sought nor benefited by the action of Respondents which abolished the town marshal position or the action of State Legislature which had required the appointment of election commissioners. Respondents have never acknowledged any catalyst effect and specifically deny it.[2]

Following remand from the United States Supreme Court, the Petitioners moved for attorneys' fees and the Petitioners moved to dissolve the Three-Judge Court. (R.Vol.2, pp.359-417, 421-428). The Three-Judge Court was dissolved on July 16, 1990, (R.Vol.3, p.717), by order citing *Bond v. White*, 508 F.2d 1397, 1400 (5th Cir. 1975), pursuant to the Motion of Petitioners.

By Memorandum Opinion and Order entered September 27, 1990, (R.Vol.3, p.719), Judge William H. Barbour, Jr., denied Petitioners' Motion for Attorneys' Fees, upon a finding that the Petitioners were not prevailing parties. The District Judge had held, correctly, that "Since Plaintiffs have not achieved any of the goals that prompted the filing of this lawsuit, this Court concludes

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[2] Respondents specifically identify footnote 3, page 4 of the Petition for Writ of Certiorari as a perceived misstatement of fact, pursuant to Rule 15.1 of the Supreme Court Rules.

that Plaintiffs have failed to establish the first requirement for the finding of 'prevailing party' status." (R.Vol.3, p.728).

The Fifth Circuit affirmed the District Court decision without written opinion, citing its local rule 47.5 that no publication of an opinion was necessary where the decision would have no precedential value but merely decided particular cases on the basis of well-settled principles of law.

The proceedings on fees in this case have exceeded the efforts put forth on the merits. By notice from the Supreme Court filed in the District Clerk's office on October 19, 1989, the judgment of the Three-Judge Court had been vacated and the case had been remanded to the District Court with instructions to dismiss the appeal as moot. (R.Vol.2., pp.353,358). On that date, all proceedings on the merits of the case were finished. Three hundred fifty-three (353) pages of the record had been created. (R.Vol. 1, pp.1-229; Vol.2, pp.230-353). Since that date, all subsequent proceedings have touched on the Petitioners' Motions for Attorneys' Fees. Three hundred eighty (380) pages of the record had thus been created regarding the attorneys' fees issue before the District Court. (R.Vol.2, p.354; R.Vol.3, p.733).

At the Summary Judgment/Injunction hearing on the merits, when questioned by United States District Judge Tom Lee about the remedy the Petitioners then sought regarding the town marshal position, an attorney for the Petitioners stated "well, one of the remedies would be attorney's fees, first of all . . . " (R.Vol.4, p.26). In this case, there were no depositions and there was no trial. The Petitioners, represented through the Legal Services

Corporation (R.Vol.1, p.5)[3], have filed a motion seeking $132,435.20 in attorney's fees (R.Vol.3, p.719) (A figure which would be substantially increased by the appeal and this subsequent Petition for Certiorari). By way of comparison, the fees and expenses charged the Respondent Town by their counsel in this action was $7,338.64. (R.Vol.3, pp.472,476). Such an award to Petitioners would be unwarranted. The denial of the fees award presents no significant issue for review.

ARGUMENT

REASONS FOR DENYING THE WRIT

I. The Single District Court Judge Decided a Question of Attorney's Fees, Not a Question Concerning Section 5 of the Voting Rights Act of 1965.

It was the Petitioners themselves who moved for the dissolution of the Three-Judge Court. (R.Vol.2, pp.421,424). The dissolution of the Three-Judge Court is supported by well-established precedent: *Bond v. White*, 508 F.2d 1397, 1400 (5th Cir. 1975), and *Jordan v. Allain*, 619 F.Supp. 98, 99 n.2 (N.D.Miss. 1985). Since the Petitioners' attorneys' fees claim is based on a catalyst theory, the Court's finding of "no change" is a finding of no change in the conduct of the Defendants for attorneys' fees purposes rather than a finding of "no change" under Section 5 for purposes of establishing relief on the merits.

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[3] Hon. Carroll Rhodes is in private practice and Hon. Willie Rose is no longer with Legal Services. Hon. Deborah A. McDonald remains with Southwest Mississippi Legal Services.

The Petitioners attempt a semantic argument, saying that a single District Judge cannot find that there was no "change" that had occurred pursuant to Section 5, (which requires a Three-Judge Court) while finding that there was no "change" for attorneys' fees purposes. This argument is self-defeating for the Petitioners since the burden is on them to show that there was a change in Respondents' conduct in order to justify their award of fees. *Associated Builders & Contractors of Louisiana, Inc., et al. v. The Orleans Parish School Board, et al.*, 919 F.2d 374 (5th Cir. 1990). The District Judge had held, correctly, that "Since Plaintiffs have not achieved any of the goals that prompted the filing of this lawsuit, this Court concludes that Plaintiffs have failed to establish the first requirement for the finding of 'prevailing party' status." (R.Vol.3, p.728). This finding of fact is a valid finding on the attorneys' fees issue. Making this finding that Petitioners were not prevailing parties does not transmute the District Court's decision on fees into a Section 5 determination.

Neither can the Petitioners claim that the Supreme Court's vacating the decision of the Three-Judge Court because the issues have become moot was in any manner an implicit reversal of the decision of the Three-Judge panel nor somehow a disagreement with that panel's decision on the merits. Instead, the vacation of judgment by the Supreme Court represents the standard, required response when a case becomes moot during the pendency on an appeal. *United States v. Munsingwear*, 340 U.S. 36, 39 (1950).

There is no substantial question presented here, there is no division among the circuits in applying settled law,

and the position of the United States Supreme Court in vacating judgments upon mootness of the issues would not justify an award of attorneys' fees.

II. Petitioners Are Not Prevailing Parties When the Unilateral Action of the Town to Abolish its Town Marshal Position was not Relief Which Petitioners Either Sought or to Which They Were Legally Entitled.

The Petitioners claim that their lawsuit prompted the Defendant Town to seek preclearance of the abolished town marshal position. However, the town marshal position had not been formally abolished, by action of the Board of Aldermen, before the suit was filed. The Petitioners did not seek its abolition. The Petitioners further did not seek preclearance of the abolition of the town marshal position. Rather Petitioners sought a prohibitory injunction enjoining the enforcement of a voting change which they alleged to have occurred, that of the elected town marshal position having become an appointed position. The town marshal was not appointed either before or during the interim during which this lawsuit was filed. Rather the town marshal position was vacant and remained vacant because no candidate had come forward to qualify for that position. The Petitioners additionally failed to show that they represented any party who had sought or would have sought to qualify for the town marshal post on either an elected or appointed basis. (R.Vol.4, p.26).

The Petitioners next attempt to raise a new challenge to an alleged failure to call special elections when and after no one qualified to run for town marshal. It is

difficult to see how holding special elections would have cured the failure of candidates to come forward for the regularly scheduled elections. Nevertheless, the Petitioners cite in support of that notion a 1908 Mississippi Supreme Court case, *State ex rel. Doolittle v. Hays*, 91 Miss. 755, 45 So. 728 (Miss. 1908). Their reliance is misplaced. *Doolittle* properly held only that a public office had not become vacant under definitions then enacted under the Mississippi Election Law. The Election Law referred to in that 1908 decision is based on a statute that has been recodified and/or amended at least three (3) times since that date and is currently in a form precleared by the United States Justice Department in 1987, again rendering any reference to such a statute moot. Neither *Doolittle* nor current State law can require a candidate to run for office. Even if there were such a requirement, such a claim would now be moot. Nor can an alleged, although moot, State law claim grant an award of attorney's fees under either Section 1988 or Section 19731(e).

Section 5, under which Petitioners now base their claim for attorneys' fees, is intended to reach any state enactment which may alter the election law of a covered state in even a minor way. *Allen v. Board of Elections*, 393 U.S. 544, 566 (1969). The Supreme Court has defined "change" in this context under Section 5 as being any change "reflecting the policy choices of the elected representatives of the people." *Hathorn v. Lovorn*, 457 U.S. 255 at 265, 266, n.16 (1982). There have been no policy choices of the Town of Woodville where no candidate has come forward and run for the town marshal position. Thus there is no Section 5 implication. Petitioners have not

secured by their litigation any relief which they sought. They are not entitled to fees.

Here, further proceedings on fees would be disproportionate to the major litigation. This Court has issued its plain admonition that "[a] request for attorney's fees should not result in a second major litigation." *Hensley v. Eckerhart*, 461 U.S. 435, 437 (1981). Further, the amount of fees sought by Petitioners, $132,435.20, is disproportionate to the amount incurred for Respondents' attorney. "Although evidence of a defendant attorney's fees are not dispositive of the reasonableness of plaintiffs' fee request, a comparison of the two is entitled to some weight." *Blanchard v. Bergeson*, 893 F.2d 87 (5th Cir. 1990).

III. The District Court Found That Petitioners Prevailed on No Issue, Whether Central or Otherwise, By Direct Relief or Catalyst or Otherwise, and Were Therefore Not Entitled to an Award of Fees.

A "prevailing party" means "a party [who] has prevailed on the merits of at least some of his claims." *Hanrahan v. Hampton*, 446 U.S. 754, 758 (1980). Since Petitioners did not prevail, they deserve no fees.

In *Hewitt v. Helms*, 482 U.S. 755 (1987) the United States Supreme Court denied attorney's fees to a plaintiff who had "neither sought nor benefited" by subsequent actions of the defendants. The Court stated, "This case presents the peculiar sounding question whether a party who litigates to judgment and loses on all his claims can nonetheless be a 'prevailing party' for purposes of an award of attorney's fees." *Id.*, at 757. A respect for ordinary language requires that a plaintiff receive at least

some relief on the merits of his claim before he can be said to prevail. A plaintiff may indeed be a prevailing party for purposes of an award of attorney's fees where there has not been a final adjudication on the merits of his claim, but the case must be terminated by virtue of a settlement or voluntary conduct which brings a defendant's action into compliance with the relief sought by the plaintiffs, *E.g., Smith v. Robinson*, 468 U.S. 992, 1006 (1984); *Maher v. Gagne*, 448 U.S. 122, 129 (1980); *Wooton v. Housing Authority of City of Dallas*, 723 F.2d 390, 392 (5th Cir. 1984). For Petitioners to prevail by such a catalyst effect, it is required that there be achieved the "settling of some dispute which affects the behavior of the defendant toward plaintiffs before the plaintiffs can be entitled to fees." *Hewitt v. Helms, supra*, at 757. The Petitioners have not sustained their burden of proving they were a "substantial factor or significant catalyst in motivating the Defendants to end their unconstitutional behavior." *Williams v. Leatherbury*, 672 F.2d 549, 551 (5th Cir. 1979).

In assessing the Petitioners' catalyst claim, the District Court applied the test set forth in *Hennigan v. Quachita Parish School Board*, 749 F.2d 1148 (5th Cir. 1985). This standard has been recently reaffirmed and applied in *Associated Builders & Contractors of Louisiana, Inc., et al. v. The Orleans Parish School Board, et al.*, 919 F.2d 374 (5th Cir. 1990). Under *Hennigan*, the first element that must be established by a plaintiff claiming prevailing party status is whether, as a practical matter, the plaintiff's goal was achieved. 749 F.2d at 1152. At the time *Hennigan* was decided, the Fifth Circuit applied a "central issue" test. The Petitioners have here attacked the District Court's decision for having quoted part of the *Hennigan* language

using the old "central issue" requisites. However, the Petitioners have failed to show how, as a practical matter, they prevailed on either a central issue or on any issue for which they sought relief by way of their lawsuit. *Hennigan* has been reaffirmed on its catalyst theory by *Associated Builders, supra,* which follows the Supreme Court decision of *Texas State Teachers Association v. Garland Independent School District,* 489 U.S. 782, 109 S.Ct. 1486, 103 L.Ed.2d 886 (1989). The District Court, rather than ruling that Petitioners did not prevail on the central issue of the litigation, ruled that the Petitioners did not prevail on any issue raised by their litigation.

The Petitioners here neither sought nor benefited by the action of the Defendants which abolished the town marshal position or the action of the State legislature which required the appointment of election commissioners.

CONCLUSION

The Petitioners obtained none of the relief they sought, nor were they legally entitled to any relief. As the District Court observed, they should not be awarded fees because of unilateral action taken by the Town to abolish the moribund town marshal position. There is no substantial issue presented, no misapplication of this Court's precedent, and no conflict among the Circuits in applying

this Court's standards. There is no reason to require or suggest review on certiorari of the decisions entered here below.

Respectfully submitted,

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(3)

No. 90-1761

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In The

Supreme Court of the United States

October Term, 1990

JOHN MONROE, ET AL.,

Petitioners,

v.

CITY OF WOODVILLE MISSISSIPPI, ET AL.,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

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ARGUMENT

REASONS FOR GRANTING THE WRIT

I. THE SINGLE DISTRICT JUDGE DECIDED A QUESTION OF COVERAGE UNDER § 5 OF THE VOTING RIGHTS ACT OF 1965

Respondents erroneously argue that the single district judge's finding that "no change" in voting had occurred prior to petitioner filing their § 5 action seeking a declaratory judgment and injunctive relief was in fact a finding that there had been "no change in the conduct of the Defendants for attorneys' fees purposes[1] . . . " [Respondents' Brief in Opposition, p. 9]. In fact, the single district judge specifically ruled, "[T]his Court has determined that *no changes in voting practice or procedure* as relates to the town marshal position had taken place prior to the institution of this suit." (emphasis added). [Appendix 11a]. The single district judge went on to rule that, "[T]he actions taken by Woodville to abolish the town marshal position took place after the suit had been filed and were not part of the occurrences complained of by the Plaintiffs."[2] [Appendix, 11a-12a]. The respondents

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[1] This statement by respondents is a perceived misstatement of fact.

[2] The single district judge had mistakenly decided that "Woodville undertook the housekeeping procedure of abolishing the town marshal position in which there had been no interest by a single candidate in several years." after petitioners had "failed to prove their case". [Appendix, 11a]. A

(Continued on following page)

argument to the contrary, [Brief in Opposition, p. 10], is misplaced.[3]

The first question presented in petitioners Petition for Writ of Certiorari is substantial. The question presented gives the court the opportunity to delineate for lower courts the proper function of three-judge district courts and the proper functions of single district judges in § 5 cases where the plaintiffs seek attorney fees and the case is mooted before plaintiffs obtain a judgment.

(Continued from previous page)

chronology of the case clearly shows that petitioners complaint was filed on March 2, 1988. [Appendix, 4a]. Petitioners filed a motion for summary judgment on their § 5 issues and to convene a three-judge district court on January 12, 1989. Respondents filed a motion for partial stay of proceedings on February 6, 1989. [Appendix, 23a-25a]. Then, on February 7, 1989, they adopted a formal resolution abolishing the town marshal position. [Appendix, 26a]. Respondents then made a formal submission of the abolition of the elected town marshal position (the alleged housekeeping measure) on February 28, 1989. [Appendix, 26a-29a]. On March 24, 1989, the three-judge district court denied petitioners motion for summary judgment [Appendix, 5a] and entered a formal order to that effect on April 25, 1989. [See Jurisdictional Statement in *Monroe v. City of Woodville, Mississippi*, Sup. Ct. No. 89-301, p. A-1]. The voting change was precleared by the United States Attorney General on May 2, 1989. [Appendix, 5a].

[3] The respondents erroneously argue that the single district judge ruled that no change in the respondents conduct had occurred. [Brief in Opposition, pp. 9-10]. However, the district judge's opinion clearly shows that the judge ruled that no voting change had occurred. See footnote 2, supra.

II. IN A § 5 VOTING RIGHTS ACTION A PLAINTIFF DOES NOT HAVE TO SPECIFICALLY REQUEST THE RELIEF ACTUALLY GRANTED IN ORDER TO BE CONSIDERED A PREVAILING PARTY

Respondents, in the second argument in their Brief In Opposition, pp. 11-13, revisit the questions presented by appellants (petitioners herein) in their Jurisdictional Statement in *Monroe v. City of Woodville, Mississippi,* Sup. Ct. No. 89-301. Respondents here argue that "the town marshal position had not been formally abolished, by action of the Board of Aldermen, before the suit was filed." [Brief in Opposition, p. 11]. As previously addressed by petitioners, the failure of the Town of Woodville to fill the position of town marshal for more than 12 years by general or special election when required by state law to do so was a de facto change in voting. [See Jurisdictional Statement in *Monroe v. City of Woodville, Mississippi,* Sup. Ct. No. 89-301, pp. 5-8, citing *Allen v. Board of Elections,* 393 U.S. 544 (1969), *Hathorn v. Lovorn,* 457 U.S. 255, 265 n. 15 (1982); *N.A.A.C.P. v. Hampton County Election Commission,* 470 U.S. 166 (1985). General elections were required by state law to fill the town marshal position every four years since 1890. Special elections were required to fill offices that became vacant due to death, resignation or otherwise.[4]

---

[4] Section 21-15-5, Miss. Code Ann. (1972), recodified as § 23-15-857, Miss. Code Ann. reads as follows:

> When it shall happen that there is any vacancy in a city, town or village office which is elective, the unexpired term of which shall not exceed six

(Continued on following page)

Respondents assertions that petitioners argument that Respondents had implemented a de facto voting change by not holding elections for town marshal when required to do so by state election laws and consistent with the town's past practices was a "new challenge",

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(Continued from previous page)

> months, the same shall be filled by appointment by the governing authority, or remainder of the governing authority of said city, town or village. . . .

Section 21-11-9, Miss. Code Ann. recodified as § 23-15-857 (Supp. 1990) reads, in part, as follows:

> When it shall happen that there is any vacancy in an elective office in a city, town, or village, the unexpired term of which exceed six months, the governing authority, or remainder of the governing authority, of said city, town or village *shall make and enter on the minutes an order for an election to be held in such city, town or village to fill the vacancy* . . . (emphasis added).
>
> *. . . In the event no person shall have qualified at least ten days prior to the date of the election, the governing authority, or remainder of the governing authority, shall dispense with the election and fill the vacancy by appointment.* (emphasis added).

These statutes clearly show that no elective municipal office could remain vacant for 12 years. If more than six months was remaining on the marshal's term when Mr. McCarstle died, then a special election was required to fill the office. If less than six months was remaining on the term when he died, then the Mayor and Board of Aldermen were required to appoint someone to fill the remainder of the term (until the Summer, 1977). After then, the person so appointed would run for office during the regular general elections if another person qualified as a candidate for the office. If no other person qualified as a candidate, then the person so appointed would hold over in the office until the next regular election.

[Brief in Opposition, p. 11], is clearly in error. Petitioners made these arguments before the three-judge district court. [See Jurisdictional Statement in *Monroe v. City of Woodville, Mississippi,* Sup. Ct. No. 89-301, pp. E8-E11].

Respondents also argue that petitioners were not granted any relief prayed for in their complaint. [Brief in Opposition, pp. 11-15]. Specifically, respondents argue that petitioners were not granted declaratory relief that a change in voting with respect to the town marshal position had occurred, and petitioners were not granted any injunctive relief. However, petitioners had only one claim for relief. Petitioners cause of action paragraph stated:

> The plaintiffs challenge the city of Woodville's act of changing the method of selecting its town marshal and election commission members from elected positions to appointed positions without obtaining Section 5 preclearance as a violation of the rights secured to them by the Voting Rights Act of 1965, as amended.

This court has clearly stated, "[I]t is sufficient to recognize that complaint asserting only one legal right, even if seeking multiple remedies for the alleged violation of that right, states a single claim for relief." *Liberty Mutual Ins. Co. v. Wetzel,* 424 U.S. 737, 744 n. 4 (1976). Petitioners asserted only one legal right, i.e. that the respondents had violated § 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c, by not obtaining preclearance of their failure to hold elections for town marshal.[5] "Many civil rights cases

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[5] Respondents devote much time in their Brief in Opposition, pp. 2-3, to petitioners § 5 claim involving election

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will present only a single claim." *Hensley v. Eckerhart*, 461 U.S. 424, 435 (1983). Petitioners presented only one legal claim in the instant § 5 action; whether or not the respondents had violated § 5 by not holding elections for town marshal. Respondents were put on notice of the § 5 violation on March 2, 1988, the date petitioners filed their complaint. See *Clark v. Roemer*, Sup. Ct. No. 90-952, at p.7 (decided June 3, 1991). The Court of Appeals for the Fifth Circuit's summary affirmance of the district court's decision that no voting change had occurred and that petitioners were not prevailing parties does, indeed, conflict with clear precedent established by this court. See, *Allen v. Board of Elections*, supra; *Hathorn v. Lovorn*, supra; *N.A.A.C.P. v. Hampton County*, supra; *Liberty Mutual Ins. Co. v. Wetzel*, supra; *Hensley v. Eckerhart*, supra; *Clark v. Roemer*, supra.

CONCLUSION

On the basis of the facts and authorities cited herein and in the Petition for Writ of Certiorari, this Court should grant the Petition for Writ of Certiorari, and enter a per curiam Opinion of the Court reversing the lower court's decision and remand the case to the lower court

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commissioners. It is not necessary for petitioners to address respondents' implications here since the § 5 claim pertaining to election commissioners has not been presented by petitioners in their Petition for Writ of Certiorari or in the Jurisdictional Statement filed in *Monroe v. City of Woodville, Mississippi*, Sup. Ct. No. 89-301.

with instructions to enter judgment for petitioners on their motion for award of attorney fees and to decide a reasonable attorney's fee due petitioners.

Respectfully submitted,

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